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IN THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari

vs.

H. THAXTON MONK, JR., as Administrator of the Estate of Mrs. Dorothy E. Reece, Deceased, and THE UNITED STATES OF AMERICA,

Respondents in Certiorari

PETITION FOR WRIT OF CERTIORARI FOR REVIEW OF JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WYMAN C. LOWE,

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VS.

H. THAXTON MONK, JR., as Administrator of the Estate of Mrs. Dorothy E. Reece, Deceased, et ux,

Respondents in Certiorari

PETITION FOR WRIT OF CERTIORARI FOR REVIEW OF A JUDGMENT AND DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW WYMAN C. LOWE, by his attorney, a Member of the Bar of this Court, and petitions the Court for writ of certiorari for review of the case "Wyman C. Lowe, Appellant v. H. Thaxton Monk, Jr., as Administrator of the Estate of Mrs. Dorothy E. Reece, Deceased, et al, Appellees", in the United States Court of Appeals for the Fifth Circuit, including the judgment rendered therein on June 26, 1967, affirming judgment and decree of the United States District Court, Northern District of Georgia, Atlanta Division, for the defendant H. Thaxton Monk, Jr., as said Administrator, filed and entered on March 30, 1966. Petitioner respectfully shows as follows in this his petition, which is prepared in compliance with the requirements in Rule 23 of this Court as to the contents and the order of contents of such a petition, the paragraphs herein

being numbered or lettered in a manner corresponding to the numbering or lettering of the paragraphs in Rule 23:

1.

(a) REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW, IF ANY, AND REPORTED.

The Opinion of said United States Court of Appeals in the case was delivered PER CURIAM in two sentences on June 26, 1967. A copy of a printed copy of that Opinion, which was received by mail by petitioner from the Clerk of said Court of Appeals during last week in June, 1967, is appended within the Appendix hereto. Petitioner has been unable to find any report of that Opinion in the Federal Reporter, including Advance Sheets thereto. Reference is made to the last sentence of the two-sentence Opinion of the Court of Appeals in the Appendix hereto, wherein it seems to be indicated that the opinion delivered by the United States District Court in the case was published in the Federal Supplement. However, spaces in the printed copies of said Opinion of the Court of Appeals for indication of the volume number and page number of the Federal Supplement where any publication of said Opinion are blank underlined spaces, without any volume or page numbers inserted or included. It appears the Court of Appeals had difficulty in trying to locate any volume and page of the Federal Supplement containing the Opinion of the District Court. After diligent search, petitioner has been unable to find any volume and page in the Federal Supplement containing

said opinion. Since petitioner has been unable to find any such Opinion in the Federal Supplement, and since the judgment and decree of the United States District Court was based on its prior Order that was entered on March 23, 1966, in effect granting the motion for summary judgment of Mr. Monk, as said Administrator, a copy of that Order is appended in the Appendix hereto.

(b) STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(i) The date of the rendering and entering of the judgment or decree of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was June 26, 1967.

(ii) No motion or application for rehearing having been filed with said Court of Appeals, no Order respecting a rehearing was rendered. An Order rendered by Mr. Justice Black on Monday, September 25, 1967, and entered on said date in effect granted a previously submitted application for time extension and extended the time for petitioner, Wyman C. Lowe, to file said petition for certiorari until and including October 24, 1967.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the case in question, including the judgment of the Court of Appeals therein, by writ of certiorari is codified in the following parts of Section 1254 of Title 28 of U.S.C.A.:

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

(c) QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Did the Trial Court err in apparently construing words in a letter (R.,pp.40,41) from Mr. George Gearin of the Internal Revenue Service to Charles R. Smith and Wyman C. Lowe, attorneys, which words as quoted by the Trial Court (R.,p.153) in its "Discussion" in its Order rendered on March 23, 1966 "on Motion for Summary Judgment" (R.,pp.147-153) being "We are not rejecting Mr. Smith's tender, and if he so desires, we will again receive this check for whatever legal effect it might have" to have the following meaning that was acribed thereto by the Court in its "Discussion" in its said Order (R.,p.153):

> "As Mr. Gearin expressly agreed to accept the certified check in payment and did accept same in payment***"?

2. Did the Trial Court err in stating in its "Discussion" in connection with its "Findings of Fact" in its Order, rendered on March 23, 1966 "on Motion for Summary Judgment" (R.,pp.147-153) that

> "As Mr. Gearin expressly agreed to accept the certified check as payment, and did accept same as payment" (R., p.153),

then using that statement of the Court as full or part basis for its Numbers (3), (4), and (5) Conclusions of Law, and then predicating its Judgment or Decree, filed on March 30, 1966

fully or partially upon said herein quoted words of its "Discussion" and said three of its "Conclusions of Law," there being nothing in the record to show Mr. Gearin ever expressly agreed to accept the certified check in payment or did ever accept it in payment, the statement of Mr. Gearin in letter by him of March 31, 1966 to Charles R. Smith and Wyman C. Lowe, attorneys, to which the hereinbefore quoted statement of the Trial Court refers being only

> "We are not rejecting Mr. Smith's tender, and if he so desires, we will again receive this check for whatever legal effect it might have"?

3. Did the Trial Court err in declining to determine in its Order rendered March 23, 1965 whether anyone of the two purported tenders, referred to by the Court as (a) and (b) R.,pp.151,152) in the Court's Order rendered March 23, 1966 (R.,pp.147-153) "was sufficient" and then holding, in effect, in its "Discussion" and its numbers (2), (3), and (4) Conclusions of Law in its said Order that the purported tender indicated in (b) and (c) of said "Discussion" of the certified check in amount of $3060.00 to Mr. Gearin of Internal Revenue Service on March 24, 1965, and re-tender on March 31, 1965 were sufficient, the validity of such tender and re-tender being contingent, as shown in 26 U.S.C.A. Sec. 6337 (b) (2) on whether Wyman C. Lowe could be located in Fulton County so that proper tender or payment could be made to him?

4. Did the Trial Court err in holding, in effect, in its "Discussion" and "Conclusions of Law" in its Order "on motion for Summary

Judgment" rendered March 27, 1966 "after considering the pleadings, evidence, requests and briefs" that, on basis of only the tender of the certified check to Mr. George Gearin of the Internal Revenue on March 24, 1965 and re-tender of it to him on March 31, 1965, there had been exercise of the right of redemption as provided in 26 U.S.C.A. 6337 (b) (2), when that Code Section contains a clause, in effect, showing restricting right of redemption by payment of redemption money "to the Secretary or his delegate****" only in event the purchaser at such sale as indicated in this action "cannot be found in the county in which the property to be redeemed is located" when the pleadings, evidence, requests, and admissions, and briefs overwhelmingly showed Wyman C. Lowe could have been located by attorneys for said Mrs. Reece within Fulton County during the year next following said sale by reasonable diligence on their part and that, at the very least, there were genuine issues of fact as to whether he could have so been located within Fulton County?

5. Did the Trial Court err in assuming or holding, in effect, in its "Discussion" within its Order, rendered March 23, 1966, that said Mrs. Reece was a tenant in common with said Mr. Reece on said lands (R.,p.151), when it appeared that was a genuine issue of fact as to whether she was such tenant in common on all said lands at the time of said sale, there having been no evidence in the record she was, Wyman C. Lowe having denied in his pleadings she was a tenant in common on all said lands involved in this action, and the other defendant, said Mrs. Reece, also Mr. Monk as Administrator of Estate of Mrs. Reece after her death, having alleged in their pleadings she was a tenant in common?

6. Did the Trial Court err in holding, in its "Discussion" in its said Order rendered March 23, 1966, that

> "By being a tenant in common coupled with the quitclaim deeds, Mrs. Reece was such a person entitled to redeem the property from the tax sale and she clearly had the right to protect this interest by reddeming the property,"

without indicating or explaining in any way what added right or privilege the said Quit Claim Deeds gave Mrs. Reece with respect to the personal privilege of redemption that Mr. Reece had, as owner of the undivided interest sold at said sale, nothing in the record showing that the personal privilege of redemption Mr. Reece, as owner, had was transferred to Mrs. Reece by the Quitclaim Deeds?

7. Did the Trial Court err in holding in its "Discussion" in its said Order, that was rendered on March 23, 1966 what is quoted in appellant's next preceding statement of question herein, when it is clear that if Mrs. Reece was a tenant in common with Mr. Reece on the date of the sale, such tenancy in common on all the lands involved being denied by Wyman C. Lowe in his pleadings, when Mr. Reece later executed said Quitclaim Deeds on February 25, 1965, he and Mrs. Reece ceased being tenants in common, and were not tenants in common when the tender and re-tender of the said certified check to Mr. Gearin of the Internal Revenue Service were made in the following month of March, 1965, said tender and re-tender having been the only attempted tenders in which the Trial Court held the rights of redemption was properly exercised?

8. Did the Trial Court err when it assumed or held, in effect, in its said "Discussion" in its Order rendered on March 23, 1966 "on Motion for Summary Judgment" that the execution by Mr. Reece of the said Quitclaim Deeds and filing of them for record on February 25, 1966 helped give Mrs. Reece a right of redemption of Mr. Reece's former interest, when 26 U.S.C.A. 6337 (b) (2), which fully applied and controlled as to redemption of the interest of Mr. Reece sold at said sale in conferring on "any person having an interest therein, or a lien thereon" the right to redeem referred, by use of the present tense participle "having," to only persons having an interest in or lien on the property sold at the time of the sale, not an after acquired interest or lien?

9. Did the Trial Court err when it assumed or held, in effect, in its "Discussion" in its Order rendered March 23, 1966 that the execution by said Mr. Reece of said Quitclaim deeds to said Mrs. Reece and filing of them on February 25, 1966, prior to expiration of the one year period for redemption of his interest in the lands that had been sold at tax sale to Wyman C. Lowe on March 31, 1964, helped give her right of redemption, when the intent of Congress that words in 26 U.S.C.A. 6337 (b) (2) showing what other persons besides the owner of land or an interest therein at time of a tax sale, specifically the words "and any other person having an interest therein, or a lien therein, or any person in their behalf" would refer only to such persons as of the time of the sale appears from the inclusion of the words "or assigns" in paragraph (b) (2) of said Code Section with respect to persons for whose use redemption money may be received, and the absence of such words or words closely related thereto in

meaning in paragraph (b) (1) of said Code Section with respect to persons shown therein to have any right of redemption?

10. Since 26 U.S.C.A. 6337 (b) (1) and (2) are applicable to this action and since said (b) (2) clearly restricts the payment of redemption money to "the Secretary or his delegate" to a situation in which the purchaser "cannot be found in the county in which the property to be redeemed is located," did the Trial Court err in holding in its "Discussion" in its Order rendered March 23, 1966, "on Motion for Summary Judgment" that said tender and re-tender in March, 1965 by said Mr. Smith, attorney, for said Mrs. Reece of the certified check to Mr. Gearin of the Internal Revenue Service was "an exercise of the right of redemption as provided in 26 U.S.C.A. 6337 (b) (2)" and in ruling accordingly in other parts of that Order and in its said decree, when the evidence, pleadings, admissions as to requests, showed there were genuine issues of fact as to whether either of the only two attorneys for Mrs. Reece, Mr. Roberts and Mr. Smith, had been diligent in their efforts to find Wyman C. Lowe within Fulton County in the year next following the date of said tax sale, especially when there is no evidence or anything in the record to show there was any effort whatever in the time from April 21, 1964 until the latter part of February, 1965, a period of about ten months, on the part of said Mr. Roberts, said Mr. Smith, or anyone else in behalf of Mrs. Reece to effect redemption of Mr. Reece's former interest in the real property involved?

11. Did the Trial Court err in holding in its "Discussion" in its Order rendered March 23, 1966 that said Mrs. Reece was a tenant in common at the time of the tender on March 24, 1965 and re-tender on March 31, 1965 of the certified check for $3,060.00 by said Mr. Smith, attorney, for Mrs. Reece, when the undisputed evidence was that Mr. Reece had on

February 25, 1965, executed and caused to be filed for record Quitclaim Deeds conveying to Mrs. Reece any interest he might still have in said real property?; and did the Trial Court err in further holding in said "Discussion" that Mrs. Reece being a tenant in common then, coupled with interest she received by said Quitclaim Deeds, caused her to be a person entitled to redeem from the tax sale?; in making its Number 2 Conclusion of Law that, as the owner of a one-half undivided interest in the property, coupled with the Quitclaim Deed from Mr. Reece to her, she was such "a person having an interest therein" and under Section 6337 (b) (1), Title 26, U.S. Code entitled to exercise the right of redemption, and in molding its decree accordingly, when the evidence, pleadings, and admissions showed there was a genuine issue of law as to her being such a "person having an interest therein" and entitled to so redeem under said Code Section?

12. Did the Trial Court err in holding, in effect, in its said "Discussion" (R.,p.153), in its Number 2 Conclusion of Law, and in molding its decree accordingly, that Mr. Gearin, of the Internal Revenue Service, was empowered to decide, under the facts and circumstances shown in the evidence, the pleadings and admissions, some of which facts and circumstances he was not aware of, whether the said certified check should be "accepted," as distinguished from "received," as tender or payment in behalf of Mrs. Reece as a person who claimed to have the right to redeem, Mr. Gearin acting then only in a capacity as ministerial delegate for said Secretary, not as a judge of the facts and circumstances, and not as an agent for Wyman C. Lowe, an interested party?

13. Did the Trial Court err in failing to state, in effect, in its Order rendered March 23, 1966, having title at top of its first

page "Order on Motion for Summary Judgment," in either its "Findings of Fact," "Discussion," or "Conclusions of Law" therein that the evidence, pleadings, and admissions as to requests to admit showed genuine issues of fact as to some of the material issues involved?

14. As to the tender and re-tender of said certified check, shown in the statement for the United States of America by the United States Attorney as to Deposit of the check pursuant to Court Order (R.,p.155) to be a certified check payable to Atty. Charles R. Smith and endorsed by him, in lieu of cash or currency, the check not being legal tender, did the Trial Court err in holding in its said Order of March 23, 1966, and in molding its decree accordingly, that it was good tender?

15. Did the Trial Court err in making all of its Conclusions of Law, except No. 1, in its Order of March 23, 1966, filed March 28, 1966, and in rendering its judgment and decree, filed March 30, 1966? (R., pp.153, 154,156)?

(d) STATUTES, CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, OR REGULATIONS WHICH THE CASE INVOLVES

The parts of the main statute which the case involves, an United States statute relating to redemption of real property sold for Federal taxes, (1) and (2) subparagraphs reading:

> "(b) Redemption after sale.
>
> "(1) Period
>
> "The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 1 year after sale thereof.
>
> "(2) Price
>
> "Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is located, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of twenty percent per annum."

The case does not involve any constitutional provisions, treaties, ordinances, or regulations.

(e) STATEMENT OF THE CASE

As alleged in the original complaint, filed in the United States District Court, Northern District of Georgia, Atlanta Division, on June 1, 1965, the action in interpleader involved in the appeal was originally brought by the United States of America, after having been authorized and sanctioned by the Chief Counsel of the Internal Revenue Service. The defendants named in the complaint are Mrs. Albert Lee Reece (sometimes referred in pleadings of one or more of the defendants as Mrs. Dorothy E. Reece or Mrs. Dorothy Benton Reece) and Wyman C. Lowe (R.,pp.5-7). The first paragraph in the complaint reads:

> "This is an action in interpleader requesting the adjudication of rights of conflicting parties to a certified check held by the United States of America as a disinterested third party."

It was alleged in a motion filed on September 27, 1965 in behalf of H. Thaxton Monk, Jr. (R., pp.24-27) that said Mr. Monk had been appointed on September 14, 1965 by the Ordinary of Paulding County, Georgia as Temporary Administrator of the Estate of Mrs. Dorothy E. Reece, deceased. Request was made in the motion that said Mr. Monk, as such Temporary Administrator, be substituted for Mrs. Reece as a party in the action. It, therefore, appears that said Mrs. Reece died sometime between June 1, 1965, the date of commencing of the action, and September 14, 1965. The motion was granted by the District Court on October 14, 1965. (R.,p.31).

It was alleged in the complaint that "Mr. Albert L. Reece was indebted to the United States of America in the amount of $316,000.00 by virtue of United States tax liens" (R.,p.6). Attached to the Affidavit of Wyman C. Lowe (R.,pp.106, 116,117), opposing the motion of said Mr. Monk, as such Temporary Administrator, for summary

judgment, is a copy of Notice of Tax Lien by the United States of America that was filed in Office of Clerk, Superior Court of Fulton County, Georgia, showing "wagering" tax liens against said Mr. Reece in amounts of $316,014.51 and $333.32. Said Mr. Reece was the husband of said Mrs. Reece.

It was alleged in the original complaint by the United States of America and admitted in answer for said Mrs. Reece to that complaint and alleged in her cross-complaint that on March 31, 1964 Mr. and Mrs. Albert Lee Reece each owned an undivided one-half interest in certain real property (R.,pp.6,8,9):

> Lots 3,4,5,6 and a portion of 7, of Block 1, Land Lot 145, of the 14th District of Fulton County, Georgia.

It was alleged in the original complaint, by the United States of America, in this action in interpleader that the one-half undivided interest of said Mr. Reece in said described land was, pursuant to the stated tax liens and Section 6331 of the Internal Revenue Code, seized and sold pursuant to Section 6335 of that Code at a sale held March 31, 1964; that the undivided interest of said Mr. Reece therein was sold to Wyman C. Lowe upon his bidding and paying $2550.00 therefor to the United States of America; and that Wyman C. Lowe received a Certificate of Sale covering said undivided interest of Mr. Reece. (R.,p. 6). Photocopy of that Certificate of Sale attached to an amendment of Wyman C. Lowe to his cross-complaint (R.,pp.76,77,85,93,94,95) shows that any deed for the property purchased that would be issued to W. C. Lowe, or his assigns, if the real property not redeemed in manner and within time

prescribed by Section 6337 of the Internal Revenue Code, upon surrender of the Certificcate of Sale, would operate "as a conveyance of the right, title and interest of Albert Lee Reece in and to the real property sold," but said Certificate of Sale does not show that a one-half undivided interest of Mr. Reece in said land would be conveyed by deed to Wyman C. Lowe.

Further allegations were made in the complaint by the United States that said Mr. Reece "conveyed by quitclaim deed any interest he might have had in his one-half undivided interest in the above described real property to Mrs. Albert Lee Reece." In a letter, dated March 31, 1965, by Mr. Charles R. Smith, then attorney for said Mr. Monk, as said Administrator, addressed to Mr. George Gearin, Chief, Special Procedures Branch, Internal Revenue Service, Atlanta, Georgia, copy of said letter being attached to Affidavit of said Mr. Smith that is attached to the motion of said defendant for summary judgment (R.,pp.32,33,34,35,41,42, 43), Mr. Smith stated (R.,last paragraph on p.42) that on February 25, 1965, said Mr. Reece had granted to Mrs. Dorothy Reece "all the right, title, interest, claim and demand to the remaining one-half undivided interest in Quit Claim Deeds dated the 25th day of February, 1965 and recorded in Fulton County Records, Deed Book 4378, Pages 279-280."

It was further alleged in said complaint by the United States of America that on March 31, 1965, acting for an in behalf of Mrs. Reece tendered a certified check in the amount of $3,060.00 and endorsed in blank with signature of Charles R. Smith to the District Director of Internal Revenue together with an

affidavit alleging his diligent, but unsuccessful, effort to locate and deliver the check to wyman c. lowe.

The reasons why the interpleader action was brought are averred as follows in the original complaint:

> "The plaintiff is unable to determine whether or not Mrs. Albert L. Reece is a proper party to assert a right of redemption in the above-described property or whether a proper tender was made of monies sought to be used to redeem the above-described property or who is the rightful owner of the above-described certified check."

Said last quoted averments contain in essence what are three main issues or questions presented for review in and by this petition for writ of certiorari.

Section 6337 (b) of 26 U. S. C. A., entitled "Redemption of real estate after sale" governs redemption of real estate sold at a public sale pursuant to lien and levy thereon for federal taxes. Paragraphs (1) and (2) thereof read:

> "(1) Period.
>
> "The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 1 year after the sale thereof.

"(2) Price.

"Such property of tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum."

The plaintiff, United States of America prayed judgments as follows:

"1. That complainants be required to appear in this action and prove their respective claims or be forever barred from making claim against the plaintiff for the above-described check.

"2. That defendants and each of them be enjoined from commencing further litigation and that they be compelled to litigate all claims in this action.

"3. That the plaintiff be allowed to deposit the above-described certified check in the registry of the Court.

"4. That plaintiff upon depositing the aforementioned check into the registry of the Court shall be discharged from any further liability to the defendants herein and shall be dismissed as a party to this action.

"5. For such other and further relief as to this Court seems just."

Reference is made to the Index of the Record. It shows that, among the various papers filed, were Mrs. Reece's answer to the complaint and her cross-complaint, answer of Wyman C. Lowe to the complaint, verified amendment of Wyman C. Lowe to his answer to the complaint, the amendment including his cross-complaint; motion, filed January 6, 1966, of the defendant, Mr. Monk, as Administrator of the Estate of said Mrs. Reece, for summary judgment, and motion, filed January 24, 1966, of the defendant, Wyman C. Lowe, for summary judgment. The motion of Mr. Monk, as said Administrator, for summary judgment has attached thereto, as part thereof, the affidavit of Mr. Smith, attorney for said Administrator, with certain exhibits annexed thereto. The motion of Wyman C. Lowe for summary judgment has attached thereto, as part thereof, his affidavit, with certain exhibits appended thereto. An additional affidavit of Wyman C. Lowe opposing the motion of said other defendant for summary judgment also is listed in the Index of the Record and appears in the Record. A summarization was filed on March 1, 1966, by Wyman C. Lowe of evidence filed for the parties as to some main issues and statements made by counsel for the parties in pleadings, memoranda, and other papers as to those issues. Also, a supplement to said summarization was filed on March 3, 1966 by Wyman C. Lowe, who served as attorney pro se throughout the pendency of the case. The said summarization begins on page 123 of the record, and the supplement thereto begins on page 132 of the record.

Reference is made to the quotation

within Part (d) hereinbefore of subparagraphs (1) and (2) of paragraph (b) of Section 6337 of 26 U.S.C.A., said paragraph (b) being entitled "Redemption after sale". Said Paragraph (b) is on page 13 hereof.

It appears that said Mrs. Reece, wife of Albert L. Reece, was represented in the matter of her attempted redemption of the undivided interest of said Mr. Reece in said real property from some time in April, 1964 by a Mr. James M. Roberts, attorney, until his death in about January or February, 1965. The Record shows he attempted redemption in her behalf of the undivided interest of her husband only once between the date of said sale to petitioner, Wyman C. Lowe, March 31, 1964, and the date of his death, which probably occurred in about January or February, 1965. It is shown in an affidavit by Wyman C. Lowe and in a letter by Mr. Charles R. Smith, attorney, to Mr. Gearin of the U. S. Internal Revenue Service, Atlanta, copy of both in the Record, that Mr. Smith's first communication as an attorney for Mrs. Reece, with Wyman C. Lowe was in a telephone call he, Mr. Smith, made in latter part of February, 1965. He stated in said letter, dated March 24, 1965, to said Mr. Gearin, in effect, that he had become attorney for Mrs. Reece in the matter of her attempting redemption of her husband's one half undivided interest in said real property upon the recent death of said Mr. Roberts, attorney.

Said Mr. Monk, who became Administrator of the Estate of Mrs. Reece in September, 1965, and in such capacity was substituted for her as a party, in response to one of the requests of Wyman C. Lowe

for admissions, stated (R,p.98):

> "Albert L. Reece, in so far as this defendant knows or has information sufficient to form a belief, has made no tender nor sought to make a tender of any amount to redeem his interest in the land sold March 31, 1964 at public sale.* * * * * "

The death of the first attorney, Mr. Roberts, who represented Mrs. Reece in this matter, seems to have occurred in January or February,1965. The only tender attempted to be made by him in her behalf to redeem Mr. Reece's interest in the land is shown in the Record to have been made about April 21, 1964, after said sale occurred on March 31, 1964.The Record shows Mr. Charles R. Smith became her attorney in this matter in the last half of February, 1965, and that quit claim deeds as to the constituent parts of the tract of land were executed by Mr. Reece to Mrs. Reece on February 23 or 25,1965. Mrs. Reece died sometime between June 30, 1965, date of filing of her answer and cross-complaint (R,p.8) and Sept. 27, 1965, date of filing of motion of Mr. Monk, as Administrator, to be substituted as party-defendant (R,p.24).

There is no evidence in the record to show that any tender of any sum was made in any manner by or for Mr. Albert L. Reece during the redemption period of one year following the March 31, 1964 sale of his undivided interest in said real property to Wyman C. Lowe, now petitioner for certiorari. Clearly, under the provisions of subparagraph (b) (1) of Sec. 6337, 28 U. S. C.A., quoted on page 13 hereof, he as the owner of an undivided interest in said land had a lawful right to redeem, but he, probably on legal advice, chose not to make any tender to redeem during said one year period. In

this connection, Wyman C. Lowe stated (R, pp. 109-110) as follows in his affidavit (which begins R,p. 106) in opposition to the motion of said other defendant for summary judgment:

"***In the said telephone conversation in which Mr. Smith discussed said letter with me he stated, in effect, he wished to make an appointment to redeem said property. I then agreed to his making such an appointment, provided an agent of the U.S. Internal Revenue Service would be present. I gained the impression from his statements in the 'phone conversation he wished to redeem in behalf of Mr. Reece the interest of Mr. Reece I had bought, but he never then or at anytime made any tender of any money on behalf of said Mr. Reece to redeem the interest of Mr. Reece I had bought. Any redemption ever attempted later by him was in behalf of Mrs. Reece only.

"I, in effect, then indicated to him that I would meet with him at any early date when I could arrange to have such an agent of the Internal Revenue Service present, and I never refused to meet with him. I asked him to check with me again soon about such appointment. I was in my office parts of every day thereafter until April 2, 1965, and worked some in my office many of the nights between then and April 2, 1965, during the hours 8 P.M. and 10 P.M. As best I remember he did not contact me again before March 31, 1965, final date for redemption of the interest of the interest of Mr. Reece in the property, had passed.***"

Wyman C. Lowe stated also in said affidavit opposing the motion of said other defendant for summary judgment:

"On April 2, 1965, deponent delivered to Mr. George Gearin, Chief, Special Procedures Section, Peachtree-Baker Building, Atlanta, Georgia, a letter, copy of which is attached to another Affidavit of this deponent filed

"in support of his Motion for Summary Judgment. Said copy of letter (R, pp. 62-66) by reference is made a part hereof. ******* All other exhibits attached to the previously filed Affidavit of this deponent are by reference made parts hereof" (R, pp. 106-7. Foregoing reference to Record added).

In a paragraph in said letter to Mr. Gearin, of the U. S. Internal Revenue Service, Wyman C. Lowe stated (R, pp. 64, 65):

"Mr. Smith chose not to meet the undersigned in said Internal Revenue offices prior to February 23, 1965, that date said quit claim deeds were executed by Mrs. Reece and filed for record. It appears that, if money of Mr. Reece had been so tendered in such offices on behalf of Mr. Reece, it could have been levied upon on basis of unpaid tax liens, or that if said half interest had been redeemed on behalf of Mr. Reece himself his half interest could then have been levied upon. It is evident that said quit claim deeds to Mrs. Reece represented attempts to circumvent his tax liability to the U. S. Government under said liens. Mr. Reece was never denied any right to redeem himself said half interest."

A copy of said tax liens (R, p. 116) recorded in office of the Clerk of the Superior Court of Fulton County, Georgia attached to an affidavit of Wyman C. Lowe shows Federal "Wagering" tax liens of more than $316,000.00 against said Mr. Reece. He had been engaged in lottery business in violation of Georgia law.

The Order of the District Court, filed March 23, 1966 (R, pp. 147-155), upon which the Judgment and Decree of that Court, filed March 30, 1966 (R, p. 156), was based, does not contain any finding in its Findings of Fact, Discussion, or any conclusion in its Conclusions of Law to the effect that, upon consideration of the pleadings of the parties, admissions or denials with respect to requests to admit, affidavits or other evidence, that there was no genuine

issue of material fact as to whether, under the provisions of said paragraph (b), Sec. 6337, 28 U.S.C.A., Mrs. Reece was a person entitled to redeem of as to whether Wyman C. Lowe could be located within Fulton County, or whether Mrs. Reece did redeem. One of the main functions of a motion for summary judgment is determination of whether there is a genuine issue of material fact involved. There was no hearing held at any time before said Order and Judgment were rendered and entered.

It is stated in the "Discussion" (R, pp. 151-153) in said Order on which the Judgment and Decree were predicated that:

> "It is contended by Plaintiff that four (4) tenders were made in an effort to redeem, to wit:
>
> "(a) April 21, 1964, by James M. Roberts in writing to Mr. Lowe.
>
> "(b) Tender of $3,060.00 in United States currency to Mr. Lowe in person by Mr. Smith on March 4, 1965.
>
> "(c) By tender of the certified check in in the amount of $3,060.00 to Mr. George Gearin of the Internal Revenue Service on March 24, 1965.
>
> "(d) By re-tender of the certified check in the amount of $3,060.00 to Mr. George Gearin of the Internal Revenue Service."

The Court next set forth reasons in its "Discussion", as shown in the first two paragraphs on page 152 of the Record, why it would not determine whether either of the said first two tenders, (a) and (b), alleged by the other defendant was sufficient. The Court based the holding it made at end of its "Discussion" (R, p. 153) that there was "an exercise of the right of redemption" upon the two said alleged tenders (c) and (d), particularly (d), the first of which was mailing or delivery of a

The said Request, copy of which served by mail July 29, 1965, of the other defendant for Admissions regarding the copy of letter, bearing date "April 21, 1964" and having name "Mrs. Dorothy Benton Reece" signed thereto, (R,p.21) reads:

"1.

"On or about April 21, 1964 James Roberts, Esquire, now deceased, delivered to defendant WYMAN C. LOWE the original of the letter, copy of which is exhibited with this Request for Admissions, and made a part hereof.

"2.

"Defendant WYMAN C. LOWE now has in his possession the original of such letter and writing referred to in Request No. 1 above."

Counsel for the other defendant, in referring in their brief filed in the Court of Appeals to said letter, in a footnote on page 3 of the brief, stated:

"Request to admit receipt of this letter was served July 29, 1965 (R,21-23). Response was made August 8, 1965 but does not appear in transcript of record. It is, therefore, set out as Appendix I to this brief."

Inadvertently, defendant Lowe's timely served response to said Request for Admissions was omitted from the transcript of the record. As set out in Appendix to the other defendant's brief filed in the Court of Appeals, the body of the response reads:

"1.

"In reply to Request No. 1, Defendant admits that there was either delivered by U. S. Mail to his office or by Mr. James M. Roberts, Esquire, now deceased, what appears to be the original of the letter, and writing, on or about April 21, 1964, of which copy exhibited with said Request. For lack of recollection, sufficient information, and knowledge, he can neither admit nor deny whether said Mr. Roberts delivered the original to Defendant's office on or about said date, but does admit that said Mr. Roberts came to the office of Defendant some time in about the latter half of April, 1964.

"2.

"Defendant admits, in reply to Request No. 2, that he has in his possession what appears to be the original of such letter, and writing, referred to in Request No. 1."

Said quoted response of defendant Lowe and his statements in his affidavits in the Record regarding said letter are the only evidence in the Record as to a tender having been made on or about April 21, 1964, that the District Court stated in said (a) the other defendant contended was made in writing to defendant Lowe. There is no clear indication in said response that the letter, not signed by Mr. Roberts, was ever mailed or delivered by Mr. Roberts himself to defendant Lowe's office, but Lowe acknowledged receiving it. The time copy of said Request for Admissions, signed by three attorneys for said Mrs. Reece, was served was about one year and three months after April 21, 1964, date on said letter. Said attorney,

Mr. Smith, did not become attorney for Mrs. Reece until ten months after the date of said letter and no paper, signed by said other two attorneys and Mr. Smith, was filed in this case until more than fourteen months after date of said letter. The evidence in Record does not show that any one of said three attorneys had any personal knowledge about when and how delivery of the letter was made.

Defendant Lowe did not admit in his response that "Mrs. Dorothy Benton Reece" was "Mrs. Dorothy E. Reece" who is shown as a defendant in the beginning of this case, or that she was "Mrs. Albert L. Reece", wife of Albert L. Reece, His affidavits show he never knew said lady. Her identity as wife of Albert L. Reece was not established in said letter. There was no proof even of genuineness of signature of "Mrs. Dorothy Benton Reece" on the letter. The letter itself was a self-serving declaration of a person, since deceased, and, therefore, did not meet the requirement under Georgia law as to admissibility in evidence. That is requirement applicable to any evidence offered in support of a motion for summary judgment. Georgia Code Sec. 38-309 reads:

> "Declarations and entries by a person, since deceased, against his interest, and not made with a view to pending litigation, shall be admissible in evidence in any case".

Impliedly said Code Section means self-serving declarations, such as said letter was, made with view to pending litigation, which began the next year, are not admissible in evidence. In this

connection, the following citation is given:

> Will not admissible to show by declarations therein that testator loaned property to son, through whom defendants claim.
>
> Thos Echols and Wife, et al vs. James W. Barrett, Admr., 6 Ga. 443 (3).

Moreover, nothing in said letter, in which it is stated $2578. is tendered, shows the tender was a continuing tender. Additional interest at rate of 20% accrued after April 21, 1964.

Reference is again made to said (b), another tender that the District Court stated in its "Discussion" the other party contends was made on March 4, 1965. However, the District Court stated in its said Order (R,p.152) that it would not determine whether either said claimed tender (a) or (b) was sufficient, stating certain reasons why it would not so determine. Actually, there are additional reasons why either of said tenders claimed by the other party was not a valid tender.

Further in this connection, it is now pointed out that the affidavit supporting the motion of said other party for summary judgment was not signed by the party, but instead by one of that party's attorneys, Mr. Smith, but the affidavit in opposition to the said motion was signed by the party Lowe, and the affidavit supporting Lowe's own motion for summary judgment was also signed by him. Moreover, Lowe's amendment to his answer to the complaint, the amendment including his cross-complaint

against said Administrator, was sworn (R,pp.76-96).

With respect to the alleged tender (b) and the paragraph in the Court's "Discussion" regarding it (R,p.152), reference is made to parts of an affidavit of Wyman C. Lowe in opposition to the Motion of Mrs. Reece for Summary Judgment, which parts relating to said alleged tender (R,pp. 110-112). It is shown in said parts of the affidavit that at time of said attempted tender by Mr. Smith to Wyman C. Lowe, Lowe stated he had previously transferred the Certificate of Sale by the Internal Revenue Service and his interest in the land to a Mrs. Richardson, that Lowe then handed a copy of that Certificate of Sale to Mr. Smith, stated that he would carry a photocopy of the said transfer to Mr. Smith's office later that day. Said parts of his affidavit show that he did carry a photocopy of the said transfer and hand it to Mr. Smith at Mr. Smith's office later that day, thereby showing that he was not a proper person to whom any tender for such redemption should be made. Said transfer and assignment of the Certificate and Lowe's interest in said land to Mrs. Richardson was properly executed for recording, being witnessed by a Notary Public and another witness, but was not recorded. Such delivery of a photocopy of it to Mr. Smith on the date he attempted said tender to Lowe was sufficient to put Mr. Smith on inquiry and notice of existence of such transfer. It shows on its face that it had been executed on February 23, 1965, which was nine days before said March 4, 1965 attempted tender of Mr. Smith to Lowe. The retransfer to Lowe of said Certificate and Mrs. Richardson's acquired in-

terest in said land was executed on March 10, 1965 and filed for record in Office of Clerk of Fulton County Superior Court on about said date.

Copy of said transfer to Mrs. Richardson and her retransfer back to Lowe were attached as parts thereof to an affidavit of Lowe supporting his motion for summary judgment (R,pp.56-57). Reference is made to Lowe's statements in his said affidavit with respect to said transfer and retransfer (R,pp. 58,59,60).

Although said retransfer back by Mrs. Richardson was filed for record on or about March 10, 1965, there is no evidence in the record that Mrs. Reece or her counsel became aware until March 30, 1965, of the retransfer to Lowe having been filed on or about March 10, 1965. A copy of a letter of said Mr. Gearin, of the Internal Revenue Service, dated March 30, 1965, addressed to said Mr. Smith and Lowe, was attached to affidavit of Mr. Smith filed in support of said motion and to affidavit of Lowe in support of his said motion (R,pp. 40, 41,67,68). A sentence in that letter of Mr. Gearin reads:

> "Mr. Smith is hereby advised that Mr. Lowe stated on March 29, 1965 that a transfer of the property from Mrs. Richardson to him had been executed and recorded in the Fulton County Records."

It is evident from the Record that Mr. Smith, attorney for Mrs. Reece, failed to discover before March 29, 1965, which was two days before expiration of the one-year redemption period, that the retransfer by Mrs. Richardson to Mr. Lowe had been filed for record on or about

March 10, 1965. Mr. Smith was made aware of said filing for record of the retransfer by said letter of March 30, 1965 of Mr. Gearin to Mr. Smith and Mr. Lowe in which Mr. Gearin stated Mr. Lowe had informed him the day before of such filing for record. However, Mr. Smith and Mrs. Reece were on legal notice as to said retransfer when it was filed for record on or about March 10, 1965. The record discloses no attempted tender by Mr. Smith between March 10, 1965 and March 31, 1965.

That delivery by Mr. Lowe to Mr. Smith on March 4, 1965, of photocopy of said transfer by Mr. Lowe to Mrs. Richardson was sufficient to put Mr. Smith on notice of the transfer and that Mr. Smith was sufficiently on notice of said retransfer from the date it was filed for record are shown by the following Georgia Code Sec. 37-110:

> "Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, shall be equivalent to knowledge, in fixing the rights of the parties."

Since the only determination in the Order filed March 23, 1966 that there had been a redemption as provided in 26 U.S.C.A. Sec. 6337 (b) (2) was with respect to the alleged (c) and (d) tenders, argument and citations of decisions and authorities as to said two alleged tenders will be given in Part "(h) ARGUMENT" hereinafter. The purported (c) tender was alleged to have occurred on March 24, 1965, when Mr. Smith mailed or delivered the certified check to Mr. Gearin, and the purported (d) tender was alleged to have occurred when Mr. Smith again delivered the certified check to Mr. Gearin on March 31, 1965.

One main question or issue presented for review is whether or not Mrs. Reece had a right to redeem the undivided interest Mr. Reece had in said real property until time of said sale. A subsidiary question arising out of that main question is whether or not the quit-claim deeds that Mr. Reece executed to Mrs. Reece on February 25, 1965 conveyed to her the privilege of redemption that he himself had or whether such privilege was one that only he as owner at time of the sale, or his heirs, executors or administrators would have. In support of petitioner's contentions that said quit-claim deeds did not convey such personal privilege to Mrs. Reece, he refers to Sec. 6337 (b) (2) of 26 U. S. C. A, quoted on page 13 hereof, as well as subparagraph (1) thereof, and points out that in said subparagraph (b) (2) it is stated that payment for redemption from such a sale of real property is permitted to be made to the purchaser, "or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs or assigns * * * " (underscoring added). Since the word "assigns" or any word having similar meaning, such as "grantee" is lacking in said subparagraph (b) (1), which provides who is permitted to redeem, it appears the obvious intent of Congress was not to allow "assigns" or "grantees" under a deed who become such after such a sale to have privilege of redemption.

(g) BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE.

Jurisdiction of this interpleader action was conferred upon the District Court by 28 U. S. C. A. Sec. 1345 for the reason that this was an action commenecd by the United States of America.

(h) ARGUMENT

Paragraph (b) of 26 U.S.C.A. 6337, which paragraph being entitled "Redemption of real estate after sale" applies and governs in determination of whether there was a proper exercise of the right of redemption of Mr. Reece's former undivided interest in the real property involved in this action when tender of the certified check was made for Mrs. Reece on March 24, 1965 to Mr. George Gearin of the Internal Revenue Service and re-tender of it was made to him on March 31, 1965, each time by Mr. Charles R. Smith, as attorney for Mrs. Reece. The only attempted tenders made during the year next following said tax sale that the Trial Court determined in its Order rendered March 23, 1966 were sufficient were said tender and re-tender, but the Court indicated in its "Discussion" in that Order four tenders were attempted during the year next following the tax sale (R.,pp.151,152,153,154).

Subparagraphs (1) and (2) of paragraph (b) of said Code Section read:

(1) Period.

"The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 1 year after the sale thereof."

(2) Price.

"Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated,

> "then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 per cent per annum."

One main issue that is involved in this appeal is whether or not Mrs. Reece, the wife of Albert Lee Reece, whose undivided one-half interest in the real property was sold at the tax sale, was a "person having a right to redeem," on March 24 and on March 31, 1965, within the meaning of those words quoted from 26 U.S.C.A. 6337 (b) (1).

Undisputed evidence, in nature of a paragraph in a letter dated March 31, 1965, from Mr. Smith to Mr. Gearin of the Internal Revenue Service, attached to Affidavit of Mr. Smith, attorney, supporting motion brought by him for summary judgment, shows Mr. Albert Lee Reece executed Quit Claim Deeds to Mrs. Dorothy Reece as to his former undivided one-half interest in the said lands on February 25, 1965, which were recorded. (R.,pp.42,43). This was done about one month prior to the dates of the tender and re-tender of the certified check for $3,060.00 by Mr. Smith for Mrs. Reece to Mr. Gearin of the Internal Revenue Service.

The Court stated in its "Discussion" in its Order of March 23, 1966, (R.,p.157) pursuant to which Order its decree and judgment was made that (R.,p.156):

> "By being a tenant in common coupled with the quitclaim deeds, Mrs. Reece was such a person entitled to redeem the property from the tax sale***"

However, Mrs. Reece, if she had been a tenant in common with Mr. Reece at the tax sale, was certainly not a tenant in common with him when the

said tender and re-tender of the certified check were made in March, 1965, because such tenancy in common would have been dissolved by the Quit Claim Deeds. In support of this contention, the following is quoted from "Tenancy in Common," C.J.S., Section 13:

> "Acquisition of all outstanding interests by one tenant--Where all the titles and interests are united in one tenant by purchase or otherwise, the tenancy in common is dissolved. Since the tenancy in common is terminated by destruction of the unity of possession****the tenancy in common is dissolved by uniting all the titles and interest in one tenant, by purchase or otherwise which brings the whole to one severally, or by purchase at a partition sale***."

Moreover, since the right of redemption of real estate sold at a tax sale is a personal privilege, it is not transferrable. The quit-claim deeds by Mr. Reece to which reference has been made hereinbefore did not convey or transfer his personal privilege of redemption of his former undivided interest to Mrs. Reece. In this connection, it is stated by the Supreme Court of Arkansas at page 845 in 180 S.W. 2d in its opinion in Jaedecke v. Rummell, 207 Ark. 286, 180 S.W. 2d 842:

> "The right of redemption is an act of grace extended by the sovereign***."

The following is quoted from Vol. 4 of "Cooley's on Taxation," 4th Ed., Sec. 1566, said Cooley having been a Chief Justice of the Michigan Supreme Court, a law professor at University of Michigan, and a noted authority on taxation matters:

> "Who may redeem. One having no interest in property sold for taxes has no right to redeem***. A stranger to the title cannot defeat a tax purchase by redemption. The purchaser has acquired a title which is subject only to the right of those interested to redeem; and no payment of the amount by a stranger, and no acceptance of it by an official from a stranger, can affect this right. 66 Probably the acceptance of the redemption money by the purchaser himself would preclude his afterwards claiming rights under his purchase; but nothing short of his own recognition of the unauthorized act of one who, if he had no interest, would be a mere intermeddler could conclude him in such a case."

The footnote number "66" shown in the next preceding quotation from "Cooley on Taxation" refers to a decision of the Supreme Court of Georgia in McArthur vs. Peacock, 93 Ga. 715, 208 S.E. 215.

Mr. Cooley states in Section 1574, page 3104 of the same said volume:

> "****a tender made by one having no interest is ineffectual as is a tender to the wrong person****."

Part of the Court's quotation from Bennett v Hunter, 76 U.S. (9 Wall,) 326,335 (R.p.150) in its "Discussion" within its Order rendered on March 23, 1965, on which Order its judgment being based, is requoted below:

> "****and it seems unreasonable to give to the act, considered as a revenue measure, a construction that would defeat the right of the owner to pay the amount assessed and relieve his lands from the lien."

The facts in that case are not analogous to those in this case. That case involved right of an owner to redeem his land before sale. Appellant fully agrees the owner of land or an interest sold at a federal tax sale has a right to redeem and that Mr. Reece, as such owner of an undivided interest, clearly had a right to redeem. Since he is not a party in this case, it does not involve any question of attempted redemption by him.

The undersigned appellant stated in his affidavit attached to his motion for summary judgment that in a telephone call to him from Mr. Charles Smith made "a few days next preceding March 4, 1964," (R.,p.56) the undersigned gained impression from Mr. Smith's statements that "he wished to redeem in behalf of Mr. Reece the interest of Mr. Reece I had bought, but he never then nor at anytime made any tender of any money on behalf of said Mr. Reece to redeem the interest of Mr. Reece I had bought." (R.,p.57).

The undersigned appellant further stated in his said Affidavit that Mr. Smith in that telephone conversation "stated, in effect, he wished to make an appointment with me to redeem said property. I then agreed to his making such appointment, provided an agent of the U. S. Internal Revenue Service would be present." (R.,p.57).

It appears from said statements in Affidavit of the Undersigned Mr. Smith may have planned to make redemption in behalf of Mr. Reece, but abandoned such plan as to Mr. Reece when it appeared any money that might be tendered might be seized by an Internal Revenue agent because of there being a remainder of more than $300,000.00 still being due by Mr. Smith under federal wagering tax liens,

reference being made to said heirs in paragraph 5 of the original complaint by the United States (R.,p.6).

Both in said Bennett v Hunter and in Corbett v Nutt 77 U.S. (10 Wall.) 464, cited by the Court in its said "Discussion" (R.,p.150), U.S. Statutes, enacted in the first few years next after end of the Civil War to apply to a special condition brought on by the Civil War, were applicable. The U. S. statute upon which 26 U.S.C.A. 6337, (b) applicable to this action is based was enacted in 1954.

The facts in another case cited by the Court in its "Discussion" in its Order made March 23, 1966, namely, Samet v U.S., 242 F. Supp. 214 (1) differ from the facts in the facts in this action in that it dealt with the wife's right of dower. There is no allegation in the pleadings of the defendant, Mr. Monk, as said administrator, to the effect that Mrs. Reece, claiming inchoate right to dower in undivided interest in the land formerly owned by her husband and subject to tax lien had sufficient interest to permit her redemption from tax sale, as was held in the Samet case. The decision reported in that case was made by an U. S. District Court in North Carolina.

No decision of any kind of any U. S. District Court in Georgia or Georgia State Appellate Court was cited by the Court in support of it Conclusions of Law in its Order made March 23, 1966.

The only ruling of any Georgia Court the undersigned has been able to find that supports in any way any claim of a wife to right of redemption from a tax sale of real property formerly owned by her husband is Lamar v Sheppard, 80 Ga. 25, 5SE247, wherein it was stated:

> At the time land was sold for taxes and during the period of redemption the owner to whom it had been set off as homestead was confined in jail and the penetentiary. Held that the wife was the beneficiary and had she in due time tendered the amount required to redeem, the purchaser should have accepted it and redeemed the land.

Another main issue involved in this appeal, to which subparagraph (2) of 26 U.S.C.A. 6337 (b), quoted on pages 19 and 20 herein, is applicable is whether under provisions of said subparagraph (2), the evidence, pleadings, and admissions to requests show the facts and circumstances were such as to justify tender of the redemption money by Mr. Smith, as attorney for Mrs. Reece to Mr. Gearin, as delegate of said Secretary, and to justify any acceptance of it by him as payment, on ground that he could not be found in Fulton County by an attorney for Mrs. Reece during the first year after the tax sale through exercise of reasonable diligence by such attorney. Said subparagraph (2) is again quoted:

> "Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum."

Reference is made to the pleadings of Wyman C. Lowe, including any supporting affidavits and exhibits attached thereto as parts thereof, to any supporting affidavit separately made by him, and to his summarization of evidence, reference being made to the first page of each pleading, each separate affidavit, and summarization of evidence, which first pages begin in the record on pages 12,17,53,76,106,123, and 32. Reference is also made to the pleadings of Mrs. Reece and Mr. Monk, as Administrator of her Estate, including any supporting affidavits and exhibits attached thereto as parts thereof, and to any supporting affidavit separately made by or for Mrs. Reece and said Administrator by referring to the first page of each such pleading and separate supporting affidavit, which first pages begin in the record on pages 8,24,32, and 118.

Within these papers are contained statements as to efforts made or not made by attorneys for Mrs. Reece to locate him within Fulton County.

These papers show that at least there were genuine issues of fact as to evidence of any effort being made by Mr. Roberts between April 21, 1964, and date of his death, which appears to have occurred in January or February, 1964, to locate Wyman C. Lowe within Fulton County and make tender to him as to evidence of effort by any attorney for Mrs. Reece to locate Wyman C. Lowe within Fulton County and make any tender of redemption money to him during the about ten months period, April 21, 1964 to February 15, 1965.

There is no evidence whatever in the record of even any attempt having been made by Mr. or Mrs. Reece or any one for either of them during said about ten months period within said one year period to redeem Mr. Reece's undivided interest in the land.

As the Court of Appeals held in its two-sentence Opinion in the case, in effect that Mrs. Reece was a person entitled to redeem the undivided interest Mr. Reece had had in the property at time of the sale, did redeem in accordance with the provisions of Sec. 6337 of 26 U.S.C.A., and that the District Court did not err in its ruling, the questions for review arise from issues involved in the Order of the District Court rendered and entered March 23, 1966, including its Findings of Fact. Discussion, and Conclusions of Law therein and its subsequent judgment and decree.

That part of the "Discussion" in the District Court's Order on the motion of the defendant, Mr. Monk, as said Administrator, which begins about middle of page 151 of the Record and continues to about middle of page 153 of the Record is quoted next:

> "It is contended by Plaintiff that four (4) tenders were made in an effort to redeem, to wit:
>
> "(a) April 21, 1964, by James M. Roberts in writing to Mr. Lowe.
>
> "(b) Tender of $3,060.00 in United States currency to Mr. Lowe in person by Mr. Smith on March 4, 1965.
>
> "(c) By tender of the certified check in the amount of $3,060.00 to Mr. George Gearin of the Internal Revenue Service on March 24, 1965.
>
> "(d) By re-tender of the certified check in the amount of $3,060.00

"to Mr. George Gearin of the Internal Revenue Service.

"As to tender "(a) above, defendant Lowe does not deny receiving same; however, he does deny knowledge of the exact date it was received. The letter said

'Pursuant to Title 26, Section 6337, of the U. S. Code, I hereby tender to you the sum of $2,578.00 to redeem . . . . (describing the property).'

"On its face the letter shows a tender sufficient to redeem. However, as the quit-claim deed was not executed until February 25, 1965, we will not determine whether or not this tender was sufficient.

"As to tender "(b)" above, the evidence is undisputed that Mr. Charles Smith approached defendant Lowe while in the lobby of the Civil-Criminal Courts Building on Pryor Street, Atlanta, Georgia, and handed defendant Lowe some amount of United States currency stating he wished to redeem the property. Mr. Smith was advised that the title certificate had been transferred and was later given a photocopy of the transfer which assigned defendant Lowe's interest to Mrs. Richardson. As the amount of money tendered is in dispute, we will not determine whether or not this tender was sufficient.

"As to tender "(c)" and "(d)" above, the facts are undisputed that on

"March 24, 1965, Mr. Smith mailed or delivered to Mr. Gearin a letter with a certified check for $3,060.00 endorsed in blank by Mr. Smith as tender to the Secretary or his delegate in behalf of Mrs. Reece; that Mr. Gearin mailed or delivered by way of letter the check back to Mr. Smith on March 30, 1965, which Mr. Smith again returned on March 31, 1965; that the letter from Mr. Gearin was addressed to both Mr. Smith and defendant Lowe and stated therein:

> 'To Mr. Smith's copy of this letter, we are attaching his certified check on the amount of $3,060.00 so that a tender may be made to Mr. Lowe if Mr. Smith deems this advisable under the facts and circumstances of this case. We are not rejecting Mr. Smith's tender and if he so desires, we will again receive this check for whatever legal effect it might have.' (Emphasis ours)

"In the case of Kennedy v. Bateman, 217 Ga. 458, 464 (123 SE 2d, 656) it was stated:

> 'Bank checks and promissory notes are not payment until themselves paid. Code Sec. 20-1004. 'A bill, acceptance, or note of the debtor or a third person is not an extinguishment of the original demand, unless there is an express agreement to receive it as payment.' (cited cases).

'It is the rule that, where a check or draft is accepted as payment it operates as payment.' (emphasis ours)

"As Mr. Gearin expressly agreed to accept the certified check as payment and did accept same as payment, we hold that there was an exercise of the right of redemption as provided in 26 U.S.C.A. 6337 (b) (2)."

It appears from the last quoted parts of said "Discussion" that the District Court's ruling in favor of the other defendant was predicated upon the last tender made by Mr. Smith, attorney, of the certified check for Mrs. Reece to Mr. Gearin of Internal Revenue Service on the last day of the one year period involved. What was the legal effect of that tender and the receiving of the check by Mr. Gearin became one main issue in the case.

The receipt that Mr. Gearin executed to Mr. Smith when he received the letter dated March 31, 1964, the attached affidavit, and the certified check is quoted below (R, p. 43):

"Received from CHARLES R. SMITH the foregoing letter, attached affidavit, and certified check in the amount of $3,060.00.

"This 31 day of March, 1965 at 2:05 o'clock P.M.

"/s/ George J. Gearin
Chief, Special Procedures
Branch"

Two additional attorneys became counsel of record for said Mr. Monk, as Administrator, after he was substituted as a party for Mrs. Reece. Said three attorneys contended in paragraph 9 of their brief that on March 31, 1965, when Mr. Smith tendered the said check to Mr. Gearin "Mr. Gearin accepted the check". Nevertheless, nothing in said receipt shows Mr. Gearin "accepted" the check. Moreover, as shown in the quotation hereinbefore of part of the District Court's "Discussion", that Court quoted the following statement from Mr. Gearin's letter of March 30, 1965 to Mr. Smith and Wyman C. Lowe with respect to the tender of the check Mr. Smith had made to Mr. Gearin on March 24, 1965:

> "* * * and if he so desires, we will again receive the check for whatever legal effect it might have." (emphasis added)

Nowhere in any copy of correspondence by Mr. Gearin in the Record is it shown that he agreed to accept the check or expressly agreed to accept it in payment. He merely agreed in the said letter he would receive the check again and indicated in the receipt on March 31, 1965 that he had only received the check. On basis of merely these written statements of Mr. Gearin, the District Court stated in the last paragraph of its "Discussion" quoted hereinbefore that:

> "As Mr. Gearin expressly agreed to accept the certified check as payment and did accept same as payment, we hold there was an exercise of the right of redemption as provided in 26 U.S.C.A. 6337 (b) (2)."

The decision in the Kennedy v. Bateman case that the Court cited in support of its statement last quoted above from its said Order was not properly applicable to the facts in this case, because the rule involved in that decision was predicated on the clause "where a check or draft was accepted as payment".

In connection with said tender to Mr. Gearin being made by certified check, the following Georgia Court of Appeals ruling is cited:

> Tender of a check though certified not sufficient payment.
>
> Holland v. Mutual Fertilizer Co. 8 Ga. App. 714 (2), 79 SE 151.

The word "accept" means more than the word "receive". One definition or meaning ascribed in a legal dictionary to the word "receive" is "accept custody of". Definitions or meanings for the word "accept" stated in a legal dictionary are "to receive with approval or satisfaction; to receive with intent to retain".

Reference is made to that part of the quotation of the "Discussion" in said Order that begins with the second line from the bottom of page 28 hereof and continues through the second paragraph on page 30 hereof. That part of said "Discussion" seems to indicate that the District Court predicated its Order, upon which its Judgment for the other defendant was based, mainly upon its construction of a sentence quoted in that part of its "Discussion" from a letter of Mr. Gearin, dated March 30,

1964, to said Mr. Smith and Mr. Lowe, the sentence reading:

> "We are not rejecting Mr. Smith's tender and if he so desires, we will again receive his check for legal effect it might have."

Mr. Gearin, in so stating that he did not reject the tender of the certified check, did not also state he accepted it. It is respectfully stated that the sentence in Mr. Gearin's letter can not properly be construed to mean that Mr. Gearin in so stating "expressly agreed to accept the certified check", but the Court so stated in the last paragraph of its "Discussion". Also Mr. Gearin's action in so receiving the certified check on the last day of the one year allowed for redemption of the real property did not indicate that "he did accept same in payment", as the Court also stated in the same paragraph (R, p.153). The use of the word "again" by Mr. Gearin in said sentence in his letter shows he was willing to "receive" the check again like he had received it the first time from Mr. Smith six days before then. He had returned it with his said letter of March 30, 1965 to Mr. Smith.

Under the facts and circumstances existing, Mr. Gearin, in his capacity as ministerial agent of the Internal Revenue Service, did not have authority or power, under provisions of said Sec. 6337 (b) (1) of 26 U.S.C.A. that governed, to accept the check as a properly made payment of the amount required to redeem. Mr. Gearin qualified in his said letter his willingness to "receive" the check by his additional statement "for whatever legal effect it might have". That is shown in that part of his letter quoted in said part of the "Discussion".

Parts of paragraph (c) and (e) of Federal Rule 56, relating to motions for summary judgment, read:

> "(c) * * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law * * * *"
>
> "(e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. * * * *"

In support of petitioner's contentions, he also having filed motion for summary judgment, with supporting affidavit, that the pleadings, admissions on file, together with affidavits, there having been no depositions taken, show that there were genuine issues of fact and that Mr. Monk, as said Administrator, was not entitled to judgment as a matter of law,

the following citations of decisions are given:

For purposes of defendant's motion for summary judgment, allegations and inferences of fact set forth in pleadings, affidavits and other materials before court must be viewed in light most favorable to plaintiff. Adickes v. S. H. Kress & Co., D.C.N.Y. 1966, 252 F. Supp. 140.

On motion for summary judgment, the court takes as true all well-pleaded facts contained in the complaint as well as the admissions on file, giving to plaintiffs the benefit of all reasonable inferences to be drawn therefrom. Pittsburgh Hotels Ass'n. v. Urban Redevelopment Authority of Pittsburgh, D.C. Pa. 1962, 202 F. Supp. 486, affirmed 309 F.2d 186.

On motion for summary judgment court would assume truth of allegations of complaint. Mahler v. U.S., D.C.Pa. 1961, 196 F. Supp. 362.

In determining whether summary judgment is proper, statements contained in affidavits which would be inadmissible in evidence must be disregarded. Neff v. World Pub. Co., C.A. Neb. 1965, 349 F. 2d 235.

Verified pleadings may in some circumstances be treated as affidavits in support of motion for summary judgment which require opposing party to respond by showing genuine issue. Fowler v. Southern Bell Tel. & Tel. Co., C.A. Ga. 1965, 343 F.2d 150.

Court on summary judgment application was obliged to disregard affidavits containing only hearsay and legal conclusions. Engelhard Industries, Inc. v. Research Instrumental Corp., C.A. Cal. 1963, 324 F 2d 347, certiorari denied 84 S.Ct. 1220, 377 U.S. 923, 12 L. Ed. 2d 215.

Where affidavits are offered in support of motion for summary judgment, they must present admissible evidence, and must not only be made on personal knowledge of affiant, but must show that affiant possesses the knowledge asserted. Doza v. American Nat. Ins. Co., C.A.Mo. 1963, 314 F. 2d 230.

Papers supporting motion for summary judgment are closely scrutinized, whereas opponent's are indulgently treated. Bohn Aluminum & Grass Corp. v. Storm King Corp., C.A. Ohio 1962, 303 F. 2d 425.

Affidavit of defendant's counsel in support of defendant's motion for summary judgment did not comply with subdivision (e) of this rule pertaining to form of supporting and opposing on summary judgment motion, where it was made by defendant's counsel who did not have personal knowledge of most of the things that he referred to, and whose testimony thereon would not have been admissible in evidence at trial. Hoston v. J. R. Watkins Co., C.A. Cal. 1962, 300 F 2d 869.

For purposes of a motion for summary judgment, facts should be viewed favorably to party opposing the

motion where there is conflict in the affidavits. Hirtenstein v. Tenney, D.C.N.Y. 1966, 252 F. Supp. 827.

Mere fact that both parties move for summary judgment does not warrant grant of either motion if record reflects genuine issue of fact. Hindes v. U. S., C.A. Tex. 1964, 326 F 2d 150, certiorari denied 84 S. Ct. 1168, 377 U. S. 908, 12 L. Ed. 2d 178, on remand 246 F. Supp. 147.

The issue on motion for summary judgment is not what determination of fact the court would make if it were called upon to decide case on papers before it but whether or not there are issues of fact to be determined; and, if so, they cannot be determined on motion but must be tried. Reynolds Pen Co. v. W. A. Sheaffer Pen Co., 22 F.R.D. 502.

Court is not called upon to decide any issue of fact which may be presented on motion for summary judgment. Krug v. International Tel. & Tel. Corp., 22 F.R.D. 93.

An issue of fact set out in complaint and denied by answer will prevent entry of summary judgment. Van Brode Mill. Co. v. Kellogg Co., 132 F. Supp. 330.

Summary judgment may not be granted where issues of fact are presented for determination. Daziana, Inc. v. Switzer Bros., 111 F.Supp. 648.

Well-pleaded facts in the complaints suffice of themselves, regardless of affidavits, to create a fact issue requiring the denial of motion for summary judgment. United Lacquer Mfg. Corp. v. Maas & Waldstein Co., 111 F.Supp. 139.

This Supreme Court has held repeatedly that summary judgment may be given only if there is no genuine issue or dispute as to any material fact. There is no doubt that the affidavits of counsel for said other defendant and Wyman C. Lowe, as well as the pleadings of the parties showed there genuine issues of material facts. Reference is made to the herinbefore given citations of decisions in this connection.

It is respectfully pointed out that said Sec. 6337 (b) (2) provides that payment for redemption is permitted to be made to "the Secretary or his delegate" in the event the purchaser "cannot be found in the county in which the property to be redeemed is located". The preponderance of the evidence showed that purchaser Lowe could be found almost every day in said one year period in Fulton County, Georgia, the county in which the property to be redeemed is situated. There is no evidence whatever in the Record that there was any attempt to locate him from about April 21, 1964 until said Mr. Smith became attorney for Mrs. Reece in last half of February, 1965, following death of her former attorney, Mr. Roberts, or that there was any attempt to locate him between March 10, 1965, date of his filing for record of said retransfer back to him by said Mrs. Richardson. Reference is made in this conjunction to Lowe's affidavits and exhibits thereto in the Record (R,pp.55-70 and 106-117), as well as his sworn amendment to his answer to the complaint, including his cross-action therein (R,pp.76-97).The question of whether he could be found in said County is only one of the genuine issues of material fact in the case which should have precluded summary judgment. Mixed questions of fact and law were raised by the pleadings and evidence.

(h) There is appended in the Appendix hereto a copy of the PER CURIAM Opinion delivered upon the rendering by said Court of Appeals of the judgment sought to be reviewed. There is also appended hereto as the first part of the Appendix a copy of the Order of the United States District Court upon which its Judgment and Decree were based, said Order being in effect an Opinion and there having been no published Opinion of that Court.

THEREFORE, it is respectfully that the petition for writ of certiorari for review of said Judgment of the Court of Appeals should be granted.

Respectfully submitted,

CHARLES E. MUSKETT
1024 Carnegie Building
Atlanta, Georgia 30303

Attorney for Petitioner

AFFIDAVIT AS TO SERVICE

COUNTY OF FULTON, GEORGIA

I hereby certify that I have, in compliance with Rule 33 of this Court, on this date, October 24, 1967, deposited in the U. S. Mails one copy of the foregoing petition and hereto annexed Appendix in an envelope, addressed to Mr. Charles R. Smith, Mr.H. A. Stephens, Jr., and Mr Charles E. Walker, Attorneys at Law, Care of Mr. Charles R. Smith, 419 Atlanta National Bank Building, Atlanta, Georgia, said three attorneys having been counsel of record for said Mr. Monk, as Administrator, etc., sufficient postage being attached to the envelope to carry it to its destination.

WYMAN C. LOWE

Duly sworn and subscribed to before me, this 24th day of Oct., 1967.

NOTARY PUBLIC Georgia, State at Large
My Commission Expires March 19, 1968